

REGULATORY REVIEW ANALYSIS
REBUTTAL RESPONSE TO OBJECTOR'S CONSULTANT

The reason why this Consultant felt obligated to respond to Mr. Peter Friedrichs' comments, regardless of the fact that an extensive Comprehensive Plan and Regulatory analysis has been submitted on behalf of the proposed solar installation detailing absolute 'regulatory consistency,' is because of the expressed strenuous opposition and need to assure the record is protected. This Consultant has been a functioning 'Land Use Planner' and 'Zoning Official' for approximately 30-years, having reviewed on behalf of both municipalities and private clients thousands of projects, from minor single-family home additions to large-scale mixed-use developments. As an element of this extensive experience, this Consultant has reviewed and provided professional opinion on literally hundreds of Land Development Projects ("LDP"), and has never once experienced grounds for denial of an LDP that was in absolute accord with all regulatory requirements; neither necessitating 'Waivers' from the Land Development and Subdivision Regulations, 'Relief' from the Zoning Ordinance, nor any other regulatory exception.

It has been this Consultant's long-standing methodology to apply a two (2) part review process: addressing the requisite rigid legal development standards; and equally important, investigating and addressing to the practicable extent feasible, the somewhat esoteric and non-regulated softer design standards. For example, a minor addition onto a single-family residence that fails to comport with a respective setback, necessitates satisfying the requisite rigid regulatory 'burdens'. However, albeit not regulatory mandated, 'good planning practice' insists that the addition be as visually and architectural compatible as feasibly possible.

All property owners are entitled to the full property rights permitted by law, and therefore a regulatory compliant development has no basis for denial. However, it has been the experience of this Consultant that the better projects were a collaborative effort that ultimately realized developments that were much more accepting because they not merely addressed the 'rigid regulatory standards', but also those considerations that are incapable of being regulatory mandated and/or protected. The referenced development is such a project, averting maximizing introduction of a solar installation permitted by law, in order to assuage a multitude of important considerations (e.g. trail preservation). It is for these reasons why this Consultant is flummoxed by the opinion expressed by Mr. Friedrichs; concluding that the development is not regulatory compliant and likewise inconsistent with the Comprehensive Plan. These erred conclusions are an absolute misunderstanding, and in direct contradiction, with both Rhode Island General Law

("RIGL") and local regulations. This Consultant has thoroughly reviewed Mr. Friedrichs comments, and offers the following responses to individually erred assertions.

Part I - Regulatory Finding No. 1: 'The proposed development is consistent with the Comprehensive Community Plan and/or has satisfactorily addressed the issues where there may be inconsistencies [Pages 2 - 4]

1. Mr. Friedrichs Opined: "...While this reduction does help with some of the Comprehensive Plan inconsistencies, **the size of the facility is still massive** ..."

Scale and size is regulated by the respective dimensional criteria, both that which pertains specifically to solar facility installations, as well as the more general criteria. Such criteria include setbacks (physical separation and buffer requirements), quantity of deforestation, overall height of solar array panels, etc. Therefore, contending that the proposed solar facility installation is still massive, is purely personal opinion and not based upon any applicable regulatory standard. Standards that are not grounded in regulation, but merely based upon 'opinion,' 'belief,' or resulting from 'neighborhood opposition,' are purely anecdotal, and any application entirely improper. The Comprehensive Plan has already anticipated such opposition, acknowledging that it is one of the challenges that must be overcome if introduction of renewable energy is to be realized.

Challenges

o "**Public awareness and support of** climate change, energy efficiency, and **renewable energy alternatives.**" [Page 44]

2. Mr. Friedrichs Opined: "...It is the opinion of this planner that a facility of such scale dwarfs other economic development activities in this targeted economic development area ..."

By Mr. Friedrichs own acknowledgement, his determination on scale is purely opinion-based. No conclusion of law, which is necessary to ultimately determine development appropriateness, can be so based. Furthermore, there is absolutely no requirement that a development mirror, or minimally, be comparable in size, massing, or intensity to surrounding land uses in order to be deemed regulatory compliant. Such a requirement would be an absurdity, because it would preclude all development; there must always be a first, regardless of the type or intensity of development proposed. Irregardless of whether large scale development is, or is not, already present, the Comprehensive Plan absolutely supports large scale development in the respective locale, as evidenced by the following:

Policy Con 7: "Concentrate major development and community facilities in the established villages within the environmental limitations of these areas, primarily Ashaway and Hope Valley, and with Exits 1 and 2." [Page 19]

Economic Development Element: "**The Town would like to focus future larger-scale economic development initiatives around Exit 1 and Exit 2...**" [Page 66]

Economic Development - Goals, Policies and Recommendations [Pages 66 - 67]

Goal ED 1: "To provide for the expansion of the town's tax base by encouraging development of new and existing light and/or heavy industrial & office/commercial business."

Objective ED 2: "Create opportunities for new office, commercial, industrial and mixed uses at Exits 1 and 2 off of I-95 as well as in existing village areas." [Page 67]

3. Mr. Friedrichs Opined: Opening Remarks [Page 2 of 5]: "...positions Hopkinton as a utility-scale solar energy provider, which it does not appear is intended to be as part of its Comprehensive Plan ..."

Perhaps Mr. Friedrichs is not aware of the several large scale solar facility developments already approved throughout the Town of Hopkinton, which are either already in operation or under construction. Clearly, these projects could have only achieved final approval, after achieving a determination of Comprehensive Plan consistency. In all instances, there was never a suggestion that the Town of Hopkinton is positioning itself as a 'utility-scale solar energy provider.' A community has the absolute right to decide the type and location of land uses they so desire to accommodate. The Town of Hopkinton has concluded, as evidenced by the respective amended solar ordinance of 2019, that solar facility installations are an appropriate '**By-Right**' land use in the subject zoning district.

4. Mr. Friedrichs Opined: Opening Remarks [Page 2 of 5]: "...This planner strongly suggests a Comprehensive Plan amendment be adopted prior to any finding that a photovoltaic solar energy system of this scale be found consistent."

The referenced recommendation is clearly for the express purpose of altering the regulatory direction of the proposed development, thereby perhaps voiding any absolute certified vested rights. Not only is there no such requirement that a Comprehensive Plan amendment be introduced every time a development (regardless of scale and size) is initiated, but this is clearly evidenced by the number of similar developments already approved without the need for such action. Finally, this would only be necessary if there were no associated zoning regulation; Comprehensive Plan amendment being initiated as foundational support. This Consultant also refers to the argument provided at the conclusion of this report, referencing regulatory procedural process and amended RIGL addressing comprehensive plan consistency.

This Consultant once again references the respective Comprehensive Plan - Goals, Objectives, and supportive alternative energy language.

“Photovoltaic solar energy systems in commercial and manufacturing districts also provide renewable energy opportunities.” [Page 44]

Goals, Policies and Recommendations - Natural Resources Goals

Policy NR-5: **“Promote energy self-sufficiency using renewable energy and energy conservation.”** [Page 29]

Energy *“Rhode Island’s Energy Plan, Energy 2035 (Report 120), aims to create sustainable and affordable energy infrastructure that can meet the State’s energy demands and stimulate economic growth. **One of the primary strategies to achieve these goals is to increase fuel diversity by developing local renewable energy production facilities rather than relying on out-of-state energy sources.**”* [Pages 40 - 41]

Renewable Energy [Page 43]

*“The majority of the energy consumed nationally is generated from nonrenewable foreign resources. Global competition for fuel sources creates unstable and unpredictable prices, with the potential for local supply shortages. **This indicates a need for locally generated renewable energy in order to ensure economic security. Renewable energy technology has evolved to allow rising global energy demands to be met in a more sustainable way, but it is crucial for this to be implemented on a community level.**”*

*“**The Town of Hopkinton can benefit from renewable energy generating technologies as a way to decrease long term energy costs, increase The Town’s energy independence, and reduce greenhouse gas emissions. Renewable energy projects also have the potential to create local jobs, particularly in the fields of construction and professional and technical services.**”*

Public Services and Facilities - Goals, Policies and Recommendations [Page 55]

Policy PSF 17 - “Encourage renewable energy projects in the private sector.”

5. Mr. Friedrichs Opined: *“The first inconsistency is with Goal NR 1: To preserve, conserve, and protect the significant natural resources of Hopkinton as an endowment for the future of the town. Natural resources are described in Hopkinton’s Comprehensive Plan as air quality, mineral resources, wildlife, farmland / soil, plant diversity, woodlands, and water (Appendix A page 3), especially the Pawcatuck and Wood Rivers (p. 2).”*

Mr. Friedrichs knows well that a Comprehensive Plan is a broad-based advisory document, whose over-arching goals and objectives are intended to be realized on a town-wide basis, rather than on a parcel-by-parcel basis. All communities necessitate a balance of residential, commercial, industrial, and open space land resources. The Town of Hopkinton has been quite successful in

protecting large swaths of acreage in perpetuity through a variety of preservation mechanisms. The subject property and all proximate properties lining Interstate-95, have been designated for more intensive and intrusive commercial and manufacturing purpose, as evidenced by both the present zoning designation and numerous goals and objective throughout the Comprehensive Plan [referenced above]. There is no regulation precluding the property owner from using his property in the manner so proposed, and in fact many of the other permissible land uses would realize far greater disturbance of the natural resources (e.g., Brae Bern Development). Furthermore, unlike an environmentally sound and passive solar facility installation that does not necessitate any infrastructure (i.e., roadway system, water, generating effluent, lighting, etc.), all other by-right commercial and/or industrial land uses would realize far greater impact on both the natural and surrounding developed environment. Finally, a temporary solar facility installation development does not decimate the majority of land resources, unlike other land uses, because of the negotiative review process. The subject project is living proof of this fact, as evidenced by the property owner's desire to realize an end-product that is not only regulatory compliant and economically feasible, but also to the extent feasibly possible preserves otherwise unprotected important site features (e.g. trail system). The property contains in excess of 252-acres, and almost 150-acres (58%) will remain in their present natural state. Mr. Friedrichs must realize that albeit not expressly applicable to the subject property given its commercial designation and development intention, the proposed development will in fact fulfill many of the very worth objectives enumerated in regard to protecting the communities natural resources.

6. Mr. Friedrichs Opined: *"Regardless of whether or not the zoning ordinance allows the use, that does not mean that this project meets the standards for approval."*

Although, there are several development standards that need to be satisfied, they can actually be combined into two (2) specific categories, 'regulatory-oriented' and 'engineering-oriented.' The first two (2) standards are purely regulatory-oriented, referencing Comprehensive Plan and Zoning Ordinance consistency and compliancy, while all of the remaining are purely engineering (design) related. Although, the development is merely at a Master Plan (conceptual) stage of review, the information already provided has well exceeded the mandatory submission criteria, evidencing engineering appropriateness. The design has now been revised on several occasions for the express purpose of assuring all engineering (design) details have been sufficiently addressed. Clearly, this will be conclusively addressed at the Preliminary Plan stage of review. Regardless, there has not been any expert opinion entered into record contesting requisite engineering and site design details. Therefore, Mr. Friedrichs conclusive determination that

"Regardless of whether or not the zoning ordinance allows the use, that does not mean that this project meets the standards for approval," must be purely based on his opinion that the development does not satisfy the requisite regulatory standards. This too is an utter misunderstanding of the regulatory procedural process, RIGL and case law. The requisite applicable land use procedural process is thoroughly investigated in the next section of this rebuttal analysis.

Part II - Regulatory Finding No. 2: 'The proposed development is not in compliance with the standards and provisions of the municipality's zoning ordinance [Page 4]

Mr. Friedrichs states that "*This conclusion is additionally supported by legal analysis by Attorney Peter Skwirz. This evidence overwhelms flimsy conclusions from the zoning official and former Town Solicitor*". Mr. Friedrichs must be unaware that a formal Motion was entered into the record from the Planning Board based upon a litany of reasons, to include the opinion of the present Town Solicitor, that the proposed development is in fact permitted as a matter-of-right and in compliance with the Zoning Ordinance. Regardless, if there is reason to believe that the determination of the Town's Zoning Official is in error, than contesting legal counsel must have been aware that an appeal to the appropriate regulatory body, namely the Zoning Board of Review, should have been pursued in a timely fashion. The requisite Zoning Regulations are as follows:

Section 17 - 'Administration and Enforcement of the Zoning Ordinance': "*The local official responsible for administration shall be the zoning enforcement officer. The town council shall appoint as zoning enforcement officer an individual with either zoning code enforcement experience or with such related education, training and experience to perform the duties of the position. The responsibilities of the zoning enforcement officer shall include:*"

(4) "Authorizing commencement of uses of development under the provisions of the zoning ordinance

Section 20 - 'Powers and duties of the Zoning Board of Review': "The zoning board shall:"

(A) "Have the following powers and duties:"

(1) "To hear and decide appeals in a timely fashion where it is alleged there is error in any order, requirement, decision, or determination made by the zoning enforcement officer in the enforcement or interpretation of this ordinance, or of any ordinance adopted pursuant hereto."

Section 24 - 'Appeals to the Zoning Board'

(A) Right of appeal.

(1) "An appeal from any decision of any officer or agency charged in this ordinance with its enforcement may be taken to the zoning board by an aggrieved party."

(B) Appeals to Zoning Board and Procedure - "An appeal to the zoning board from a decision of any zoning enforcement officer, agency or officer may be taken by an aggrieved party. The appeal shall be taken within a reasonable time of the date of the recording of the decision by the said officer or agency by filing with the officer or agency from whom the appeal is taken, and with the zoning board, a notice of appeal specifying the ground thereof. The officer or agency from whom the appeal is taken shall forthwith transmit to the zoning board all the papers constituting the record upon which the action appealed from was taken. Notice of the appeal shall also be transmitted to the planning board. The form and such necessary data and evidence as comprised for such an appeal is set forth in appendix F, hereof."

To-date, this Consultant is not aware of any formal appeal of the zoning official having been submitted to the attention of the appropriate officials. Considering the subject development has been formally submitted, thoroughly vetted, and deemed complete for some substantial period of time, it would appear that any contesting party has lost any such rights for failing to submit **'...within a reasonable time...'**

In furtherance of this Consultant's absolute determination that the subject development is regulatory compliant with both the Zoning Ordinance and Comprehensive Plan, I offer an analysis of the procedural process by which an ordinance is submitted, reviewed, and ultimately approved. Pursuant to both RIGL 45-24-51 through 45-24-53 and Section 16 of the Hopkinton Zoning Ordinance, any textual amendment to the Zoning Ordinance necessitates a vigorous review process, that like wise necessitates public input. This is evidenced below.

§ 45-24-51. Adoption – Procedure for adoption or amendment: "The city or town shall designate the officer or agency to receive a proposal for adoption, amendment, or repeal of a zoning ordinance or zoning map(s). Immediately upon receipt of the proposal, the officer or agency shall refer the proposal to the city or town council, and to the planning board or commission of the city or town for study and recommendation. The planning board or commission shall, in turn, notify and seek the advice of the city or town planning department, if any, and report to the city or town council within forty-five (45) days after receipt of the proposal, giving its findings and recommendations as prescribed in § 45-24-52. Where a proposal for adoption, amendment, or repeal of a zoning ordinance or zoning map is made by the city or town planning board or commission, the requirements for study by the board may be waived; provided, that the proposal by the planning board includes its findings and recommendations pursuant to § 45-24-52. The city or town council shall hold a public hearing within sixty-five (65) days of receipt of a proposal, giving proper notice as prescribed in § 45-24-53. The city or town council shall render a decision on any proposal within forty-five (45) days after the date of completion of the public hearing. The provisions of this section pertaining to deadlines shall not be construed to apply to any extension consented to by an applicant."

§ 45-24-53. Adoption – Notice and hearing requirements.

(a) "No zoning ordinance shall be adopted, repealed, or amended until after a public hearing has been held upon the question before the city or town council. *The city or town council shall first give notice of the public hearing by publication of notice in a newspaper of general circulation within the city or town at least once each week for three (3) successive weeks prior to the date of the hearing, which may include the week in which the hearing is to be held, at which hearing opportunity shall be given to all persons interested to be heard upon the matter of the proposed ordinance. Written notice, which may be a copy of the newspaper notice, shall be mailed to the parties specified in subsections (b), (c), (d), (e), and (f) of this section, at least two (2) weeks prior to the hearing. The newspaper notice shall be published as a display advertisement, using a type size at least as large as the normal type size used by the newspaper in its news articles, and shall."*

Section 16 - 'Adoption and Amendment to Zoning Ordinance Map'

(A) Power of Town Council to Adopt: *"For the purpose of promoting the public health, safety, morals, and general welfare, the town council shall have the power, in accordance with the provisions of R.I.G.L., chapter 45-24-50, to adopt, amend, or repeal, and to provide for the administration, interpretation, and enforcement of the zoning ordinance. The provisions of the zoning ordinance set forth in text and map(s), and all amendments thereto, shall be consistent with the comprehensive plan, as described in R.I.G.L., chapter 22.2, and shall provide for the implementation of the town's comprehensive plan."*

(D) Notice, Hearing and Decisions.

(1) *"The zoning ordinance shall not be adopted, repealed, or amended until after a public hearing has been held upon the question before the town council, notice of which shall be given in accordance with R.I.G.L., section 45-24-53."*

It is abundantly clear that the amended solar ordinance adopted in 2019 had to proceed through a vigorous review process, inclusive of Planning Board, the public, and finally Town Council. Furthermore, ordinance adoption had to consider and ultimately conclude that it was indeed 'Consistent with the Comprehensive Plan.' This not only evidences the development's regulatory compliance, but the misconception by Mr. Friedrichs that further amendments to the Comprehensive Plan is required. The Zoning Ordinance does not limit size, other than by expressly imposed dimensional criteria, to include permitting upwards of 75% solar facility coverage.

In conclusion, this Consultant would inform the Planning Board that post the Rhode Island Supreme Court decision involving the City of East Providence and expressly addressing this very issue of Comprehensive Plan and Zoning Ordinance consistency, the Rhode Island State Legislature amended RIGL 45-22.2 'Rhode Island Comprehensive Planning and Land Use Act,' specifically RIGL 45-22.2-13(c). The purpose for the amendment was to clarify 'consistency,' even when it could be conclusively determined that there was an inconsistency. Although, the

Town of Hopkinton employed the appropriate procedures in adopting the amended solar ordinance, to include evidencing comprehensive plan consistency, were there ever an argument to the contrary, the following would nevertheless prevail affirming the same.

§ 45-22.2-13. Compliance and implementation.

(b) *"All municipal land use decisions shall be in conformance with the locally adopted municipal comprehensive plan."*

(c) *"Each municipality shall amend its zoning ordinance and map to conform to the comprehensive plan in accordance with the implementation program as required by subdivision 45-22.2-6(b)(11) and paragraph 45-22.2-6(b)(12)(iv). **The zoning ordinance and map in effect at the time of plan adoption shall remain in force until amended. In instances where the zoning ordinance is in conflict with an adopted comprehensive plan, the zoning ordinance in effect at the time of the comprehensive plan adoption shall direct municipal land use decisions until such time as the zoning ordinance is amended to achieve consistency with the comprehensive plan and its implementation schedule.** In instances of uncertainty in the internal construction or application of any section of the zoning ordinance or map, the ordinance or map shall be construed in a manner that will further the implementation of, and not be contrary to, the goals and policies and applicable content of the adopted comprehensive plan."*